
U.S. Department of Labor
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DATE: DEC 28 1992

CASE NO: 92-ERA-51

In the Matter of

JOHN GABBRIELLI,
Complainant

v.

ENERTECH,
Respondent

John Gabbrielli
11351 E. Los Osos Valley Rd.
San Luis Obispo, CA 93405
Pro Se Claimant

Before: ALEXANDER KARST
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C. 5851 (hereafter ERA or the Act).

In a complaint filed with the Wage and Hour Division of the Department of Labor, Mr. Gabbrielli alleged that in 1988 he was employed as a test machine operator by Enertech, a California engineering firm which had several employees doing some testing at the

Toledo Edison Davis-Besse nuclear power station in Ohio. Mr. Gabbrielli avers that on or about

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January 1, 1989 he was terminated by Enertech in retaliation for his refusal to follow a supervisor's illegal order to deceive the quality control department.

On July 29,1992 the San Diego District Director of the Department of Labor Wage and Hour Division advised Mr. Gabbrielli that after receiving his complaint, apparently on April 14, 1992, the Division conducted an investigation, but concluded that the action was time barred, and denied Mr. Gabbrielli's request to suspend the 30 day filing requirement. Mr. Gabbrielli timely requested a hearing here.

For purposes of this decision, which is limited to the issue whether Mr. Gabbrielli's complaint is time barred, I will assume, without deciding, that Mr. Gabbrielli was terminated by Enertech on or about January 1, 1989 in retaliation for activities protected by ERA.

At the duly held hearing of this matter on October 13, 1992 in San Luis Obispo, California, Mr. Gabbrielli appeared *pro se*. Enertech did not appear but wrote a letter on September 18, 1992 saying that since the hearing was limited to the time bar question, it would not appear but reserved its rights to notice and to appear at any future hearings.

Mr. Gabbrielli testified that when he was terminated by Enertech in January 1989, he was told and believed that he was routinely laid off due to lack of work. For a time thereafter he was home in Alabama and was preoccupied with personal problems due to a divorce and a child custody dispute. However he telephoned Enertech a number of limes to inquire about reemployment, and each time was cordially treated by its personnel manager Toni Cottrill, who assured him that he would be contacted as soon as work was available again. Mr. Gabbrielli worked in a variety of jobs outside the nuclear power industry until August 1990 when he was hired by U.S. Testing, another firm engaged in nuclear power work. At about that time he learned that shortly after Enertech terminated him, the firm hired somebody else to fill his position. Although he became suspicious at that point that Enertech terminated him because of his refusal to follow an illegal order in Toledo and not for lack of work, he continued to believe Ms. Cottrill who kept on assuring him every time he called that he would be contacted as soon as a job came up and asked for telephone numbers where he could be reached. Finally, in October 1991 he was advised by Ms. Cottrill that Enertech's chief executive told her that Mr. Gabbrielli would never be reemployed by the company.

Mr. Gabbrielli testified that a week after he was told he would never be rehired he sought the assistance of a Mr. Wong, the resident Nuclear Regulatory Commission inspector at Diablo Canyon nuclear power plant in California where Mr. Gabbrielli was then working. Mr. Gabbrielli says he told Mr. Wong his entire story, that Mr. Wong took

notes, and that he gave Mr. Wong copies of the papers related to his problems at Davis-Besse. However, Mr.

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Gabbrielli did not file any kind of a written complaint with Mr. Wong or the NRC. TR 87. In November 1991 he received a letter from NRC acknowledging his complaints to Mr. Wong on October 17,1991. C-2. Mr. Gabbrielli says that he believed that his conversation with Mr. Wong was all he needed to do to lodge a discrimination complaint under the Act.

On March 12, 1992, in connection with an unrelated request to him by the NRC, Mr. Gabbrielli received a copy of NRC Form 3 which is a "Notice to Employees" in the nuclear power industry about their legal rights. C-1. Mr. Gabbrielli says that that was the first time he became aware that he had to file a complaint with the DOL within 30 days after the discriminatory act.

At the time this case arose, the Act required that ERA whistleblower complaints be filed with the Secretary of Labor within 30 days after the violation. 42 U.S.C. 5851(b).[1] The complaint which Mr. Gabbrielli filed with DOL is undated, but is date stamped as received on April 14, 1992. Mr. Gabbrielli did not keep a copy and does not know when he mailed it. TR 36. Since 29 C.F.R. (24.3(b) says a mailed complaint is deemed filed on the date of mailing, I find it was filed on April 12, 1992.

The significant date is the date Mr. Gabbrielli was told by Enertech he would never be rehired. Mr. Gabbrielli says he cannot fix the date precisely. TR 29. But since Mr. Gabbrielli says it occurred a week before he talked to Mr. Wong, which occurred on October 17, I find that he was told by Enertech he would never he rehired on October 10, 1991. TR 29, C-2.

The 30 day filing requirement in issue here is not a jurisdictional bar to maintaining a claim, and is subject to equitable modification. *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393 (1982). Under the doctrine of equitable tolling of the statute of limitations, in a case where the defendant has actively misled the plaintiff respecting the cause of action or has otherwise prevented the plaintiff from asserting his rights, the statute will be tolled during the period the plaintiff was deceived. *School District of Allentown v. Marshall*, 657 F.2d 16 (3rd. Cir. 1981).

In this case, Mr. Gabbrielli made a *prima facie* showing, without challenge from Enertech, that until October 10, 1991, Enertech lulled him with false assurances that he would be considered for rehiring when a job came up. Accordingly, I find that the 30 day filing period began to run not when Mr. Gabbrielli was terminated but on October 10, 1991 when Enertech

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advised him that he would not be rehired.

The doctrine of equitable tolling may also excuse a late filing when a timely complaint is filed in the wrong forum. Thus the next question is whether Mr. Gabbrielli's conversation with Mr. Wong can be construed as a timely filing in the wrong forum.

Mr. Gabbrielli testified:

> [A]pproximately a week... [after being told by Enertech I would never be rehired), I contacted Mr. Wong... who was the... resident inspector with the Nuclear Regulatory Commission [at Diablo Canyon].... To discuss it with him. And I gave him a copy of the letter that I wrote to Enertech. I told him my allegations of the harassment, the problem with the machine in Ohio and things -and incidents prior to all that....
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> * * *
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> Mr. Wong took notes throughout the meeting. It was probably a 30 minute to an hour meeting with him. He took notes throughout it. He said he would forward the allegation and the concern to the region involved....
> At that point, I felt that now I just needed to wait for the NRC to contact me.

TR 40-41.

NRC did contact him by a letter dated November 12, 1991, which said in part:

> On October 17, 1991, you provided the U.S. Nuclear Regulatory Commission with information that a snubber was not tested at the appropriate load..., employment discrimination and a fitness for duty issue at Davis-Besse. An evaluation of these issues will be conducted.... [I]n order to adequately review the issue of employment discrimination, we will most likely have to provide your name to the licensee. If you object to us reviewing this concern, contact me as described below.

C-2.

From the foregoing, I infer that on October 17, 1991 Mr. Gabbrielli did tell Mr. Wong that he felt he was terminated by Enertech for discriminatory reason. However, because he did

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not do so in writing, had Mr. Gabbrielli presented the same oral complaints he presented to Mr. Wong to a DOL official, his acts would have fallen short of the requirement of 24

C.F.R. §24.3(c). *McNally v. Georgia Power Company*, 85-ERA-27, p. 11 (Sec'y September 8,1992). The complaint had to be in writing.

However, the law is that "[i]n some circumstances, where there is a complicated administrative procedure, and an unrepresented, unsophisticated complainant receives misleading information from the responsible government agency, a time limit may be tolled." *Doyle v. Alabama Poor Company*, 87-ERA-43 (Sec'y September 29, 1989). (*Decision of OALJ and Office of Administrative Appeals*, Vol. 3, No. 5, p. 43).

Mr. Gabbrielli did not allege nor attempt to prove that either Mr. Wong or the NRC misled him about what he had to do to pursue his rights. And I do not find the letter from NRC (C-2) either misleading or lulling. The letter did not advise Mr. Gabbrielli that by talking to Mr. Wong he had done all that he needed to do to file an action for employment discrimination. What is more, by the time this NRC letter dated November 12, 1991, reached Mr. Gabbrielli, presumably on November 13 or 14, the 30 day limitation statute which commenced running on October 10 had already run, and if Mr. Gabbrielli were misled by it, it would be irrelevant.

At the very most, the situation here is analogous to that in *City of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981), where a complainant instead of filing a complaint with the DOL contacted the EPA which appears to have given him inaccurate advice. The Court wrote at p. 21:

> The alleged confusion at the EPA is ...irrelevant. It is not the agency to whom a complaint is to be addressed, and in any event, when [complainant] first contacted it in April, the thirty-day period with respect to all but the ban on access claim had already elapsed. The tolling argument based upon the agency's actions is therefore limited to this one claim. In our view, that argument must be that the limitation period should be tolled because the EPA did not reply to [complainant's] inquiries more promptly and more accurately. We disagree. When all the chaff is stripped away, the naked reason for the delay was [complainant's] lack of knowledge about the remedy. The statutory language is plain and direct and leaves no basis for reliance upon the EPA in any respect. *[citations]*. [Complainant's] ignorance of the law is not enough to invoke equitable tolling. *[citations]*.

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While the Secretary of Labor has recently questioned "whether failure to post [NRC Form 3] pursuant to the NRC regulations should be adopted as an additional basis for equitable tolling under the ERA,"[2] I give complainant the benefit of the doubt, and proceed as if the statute of limitations could also be tolled if NRC Form 3 was not posted as required by law.

Early on in his testimony Mr. Gabbrielli said unequivocally that "[NRC Form 3] was posted at Davis-Besse in Toledo, Ohio, Port Gibson, Ohio on the site, on the nuclear power site." TR 7. However, he later testified that he simply has no evidence that NRC

Form 3 was not posted at Davis-Besse as required by law and has no reason to believe it was not properly posted. TR 54-55. But he insisted he never saw the form posted at Davis-Besse. TR 46, 50. In any case, Mr. Gabbrielli is adamant that the form was never posted at the Enertech trailer, or any place "within their organization and within their testing facilities and office trailers...." TR 7, 43.

Mr. Gabbrielli says he was aware of the existence of NRC Form 3 since around 1988, and he knew that it was the statement of "radiation workers' rights." He was told about the form in training classes, especially at each of his last four or five jobs after he reentered the nuclear power industry in August 1990. TR 44, 46, 49, 50. When asked whether he saw the NRC Form 3 before March 12, 1992, Mr. Gabbrielli replied: "I don't want to say 'No, I didn't see it,' and have seen it, and I don't want to say 'Yes, I have seen it.' I would have to say I have seen the form. I was not fully aware of the context [sic] of the form...." TR 45.

In any event, Mr. Gabbrielli says that at the time he spoke with Mr. Wong NRC Form 3 was posted at Diablo Can on, that he was aware of it, that the form was then available to him, and that the posting of the form "was part of [his] reasoning for talking to Mr. Wong." TR 64- 65. However, Mr. Gabbrielli maintains that he first became "fully aware of the information contained in Form was after [he] received the March 12, 1992 letter from the Nuclear Regulatory Commission." TR 44.

Even if each inconsistency in his testimony and the credibility issue is resolved in Mr. Gabbrielli's favor, and his testimony is viewed in a light most favorable to him, it must nevertheless be concluded that he has not established facts required to equitably toll the statute

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of limitations for failure to post NRC Form 3.

There is no authority for the proposition that Enertech was required by law to post the form in its trailer at Davis-Besse or elsewhere in its offices. The legal duty to post the form in conspicuous locations where it could be seen by workers going to and from their place of work is placed on the "licensee," which is to say the operator of the nuclear power plant. 10 C.F.R. §19.11(c) and §30.7(e). Enertech was clearly not a licensee at Davis-Besse, and thus was not legally bound to post the form.

Mr. Gabbrielli has not attempted to prove that the required posting was not done at Davis-Besse by the licensee.[3] His testimony is tantamount to saying that the form was probably posted, but he did not read it. And it is clear that the failure to read posted notices "are not sufficient to toll the filing period and excuse the untimely filing of a complaint." *Harrison v. Stone and Webster Engineering Corporation*, 91-ERA-21 (Sec'y October 6, 1992) p. 4.

In as much as Mr. Gabbrielli concedes that when he spoke with Mr. Wong on October 17, 1991, he knew of the existence of NRC Form 3 which spelled out his rights, and that it was readily available to him, I must find that he had enough knowledge to find out the details of the paper work required of him to secure his rights. The Secretary of Labor has ruled that where a complainant "had sufficient knowledge to send a reasonable person to pursue his or her rights...," the doctrine equitable tolling of the filing period will not apply. *McNally v. Georgia Power Company*, 85-ERA-29, (Sec'y September 8, 1992) p. 10.

Lastly, it is axiomatic that the 30 day filing requirement is not tolled because Mr. Gabbrielli did not actually know of it. *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Hancock v. Nuclear Assurance Corp.*, 91-ERA-33 (Sec'y November 2, 1992, slip op at n3).

In some of his testimony and correspondence to this office Mr. Gabbrielli used the word "blacklisted" in describing what Enertech did to him. He also complained that on the eve of the hearing in this case Enertech has attempted to adversely affect his employment relationship at

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Diablo Canyon. Apparently when he was "blacklisted" he means to say that Enertech told him it would never hire him. TR 60. He does not appear to contend, and has presented no facts to suggest, that Enertech placed him on some list of undesirable employees which it disseminated in the nuclear power industry. *See Engerieder v. Metropolitan Edison Company/G.P.U.*, 85-ERA-23 (Secy's April 20, 1987).

But Mr. Gabbrielli did write and testify that shortly before the hearing in this case Enertech told Pacific Gas and Electric, the utility running Diablo Canyon, about this proceeding, and that this caused PG&E to change his work assignments. It appears from his testimony that at Diablo Canyon he "was assigned to do a surveillance of Enertech" and others. TR 61. Apparently Enertech advised PG&E of this proceeding and asked PG&E to modify Mr. Gabbrielli's duties so that he would not be in a supervisory position over Enertech's employees. Mr. Gabbrielli considers these recent actions of Enertech at Diablo Canyon as "ongoing" harassment.

Because Mr. Gabbrielli is pro se, I have considered whether the facts he either presented or hinted at can be construed as a continuing violation by Enertech which would help him overcome the time bar. But on the basis of *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988), I conclude that the "continuing violation" theory does not apply here. As in *English*, the presumed termination of Mr. Gabbrielli by Enertech in 1989, was "...a consummated immediate violation [which] may not be treated as merely an episode in a 'continuing violation' because its effects necessarily carry over on a continuing basis." *English v. Whitfield, supra* at 962.

At most Mr. Gabbrielli's situation is analogous to that of the fired employee in *London v. Cooper & Lybrand*, 644 F.2d 811 (1981). In that case the Court rejected a contention that the giving of bad references following the firing constituted a continuing violation which would prevent the staring of the limitations period on the date of firing. The Court held that bad references "were not the sort of consequences which mutually and inevitably flow from the termination. They represent a separate form of alleged employment discrimination whose consequences would be different from those suffered as a result of a simple discharge". *London v. Cooper & Lybrand, Ibid*, at 816.

Thus Enertech's acts at Diablo Canyon on the eve of the hearing of this matter construed most favorably to Mr. Gabbrielli, cannot constitute a continuing violation which would enable him to avoid the time bar problem. Whether these actions at Diablo Canyon may have been a separate violation by Enertech is not within the purview of this proceeding, which was limited to the issue of whether Mr. Gabbrielli's complaint of discriminatory firing in 1989 is time barred.

For the foregoing reasons, I conclude that in as much as Mr. Gabbrielli has filed his discrimination complaint on April 12, 1992, which was more than 30 days after he was advised by Enertech on October 10, 1991 that he would not be rehired by it, and because his late filing cannot be excused by the doctrine of equitable tolling of the limitation statute, this complaint is time barred by 42 U.S.C. §5851.

ORDER

It is recommended that the Secretary of Labor dismiss this complaint.

ALEXANDER KARST
Administrative Law Judge

San Francisco, CA AK:mj

[ENDNOTES]

[1] The filing period was extended to 180 days by the Comprehensive National Energy Policy Act signed into law on October 24, 1992. The change is not retroactive.

[2] *McNally v. Georgia Power Company*, 85-ERA-27 at p. 5 (Secy's September 8, 1992).

[3] The DOL fact finding investigation which was triggered by Mr. Gabbrielli's complaint concluded that the Form was posted at Davis-Besse as required in 1988 when Mr. Gabbrielli worked there, and that all contractors' employees were told of posting sites at training sessions. See DOL letter of July 29, 1992. However, I have not treated this conclusion as evidence in this proceeding.